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IN THE

Supreme Court of the United States

OCTOBER TERM 1964

No. 634

LINUS PAULING,

Petitioner,

v.

NEWS SYNDICATE CO., INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Insert Page 6, Paragraph 6, after Paragraph 5:

6. Jurisdiction in the District Court was founded upon diverse citizenship, Dr. Pauling being a resident of California and the Daily News a New York Corporation.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Linus Pauling prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, entered in the above-entitled case on July 7, 1964.

Citations to Opinions Below

The memorandum decision of Judge Archie O. Dawson denying plaintiff's motion for new trial and other relief is unreported and is printed in the Appendix at 45a.* The opinion of the Court of Appeals is contained in Appendix B to this petition at pages 23-43 [74c-94c], and is reported at 335 F. 2d 659.

* The record below consists of three separately bound appendices and one stenographer's transcript of the trial proceedings. References to volume I will be designated "a"; references to volume II by "b"; and references to volume III by "c". References to the transcript will be designated "T". Nine copies of these appendices are filed herewith pursuant to Rule 21 (4) of this court.

Jurisdiction

The judgment of the Court of Appeals was entered on July 7, 1964 (74c). Rehearing was denied on August 3, 1964 (111c). The jurisdiction of this court is invoked under 28 U.S.C. Section 1254 (1).

Questions Presented

1. Whether the Court of Appeals wrongly ruled that a defense to a libel action may be predicated on "privileged facts" where the alleged libel did not purport to be a report of any official proceeding, in direct conflict with the statute and decision law of New York.

2. Whether the Court of Appeals wrongly ruled that the conclusions of Governmental Departments and Congressional Reports were admissible on the cross-examination of plaintiff in a libel action;

a) Where there was no clear connection to defendant's reliance thereon

b) Where the Court of Appeals in approving such admissibility under Section 78 of the New York Civil Rights Law is in 180 degree contradiction with that section which clearly requires the defendant to offer such evidence as "grounds for his belief" and defendant failed to do so and this ruling of the Court of Appeals is accordingly at variance with the statute and decision law of New York

c) Where this issue transcends the instant case in view of the fact that the files of agencies in the Executive Department of the Federal Government and of investigating committees of the Congress are filled with derogatory hearsay conclusions about thousands of individuals purportedly thereby connected to subversive activities

d) Where this issue has not been, but should be settled by this court because of its transcendant importance and

because the views of different Courts of Appeals on this issue are in conflict.

3. Whether the Court of Appeals has misconstrued the holding of this court in *New York Times* v. *Sullivan*, 376 U. S. 254 (1964), by extending the qualified privilege to criticize the motives and aims of a public official to permit attack on the reputation of a private citizen who publicly asserts his opinion on questions of public policy.

4. Whether proper supervision of the federal judiciary requires this court's action in view of the non-judicial conduct of the trial court judge who openly showed contempt for plaintiff by asking and permitting belittling and demeaning questions, by openly expressing its disbelief of plaintiff's testimony and by generally exhibiting partisanship for defendant's cause.

5. Whether plaintiff was deprived of his right to a proper jury determination of his case where the trial court submitted the case to the jury with instructions which were tantamount to a directed verdict and in conflict with the law of New York.

Statutes Involved

The statutory provisions involved are section 337 of the Civil Practice Act of the State of New York (now contained in Section 74 of the Civil Rights Law of New York) and Section 78 of the Civil Rights Law of New York.*

Statement

The Libel

The facts, as they affect the Questions Presented on Application for Certiorari to this Court are as follows:

1. There was no contention by the defendant in either the pleadings (6b-8b) or in the evidence at the trial that

* The text of these statutes is set forth in Appendix A of this petition at page 22.

the libelous editorial* was a report or comment on a report of any legislative or otherwise privileged proceedings.

2. Plaintiff testified at length on direct examination as to his own background (10b-20b; T 37-72) his public position on the subject of nuclear testing (21b-23b; T 73-84) and denied in detail the truth of the derogatory factual allegations contained in the editorial (14c, 15c; T 90-94). He was cross-examined as to his views on many public issues (18c-38c; 54c-69c; T 142-236; T 257-260; T 267-312) and then asked over objection:

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* ("Daily News Editorial of September 2, 1961)
Included in the article are two photos—one of Linus Pauling and one of Norman Cousins (both omitted).

Two Johnny Come-Latelies

For years, a couple of semi-prominent American loudmouths have been agitating against nuclear weapons and weapon tests—the best defense the West has against Soviet Russian and Chinese Red manpower.

The pair are Linus Pauling, a California biochemist who once won a Nobel Prize, and Norman Cousins, editor of something called the Saturday Review.

Cousins and Pauling now profess to be horrified by Khrushchev's announcement of Soviet resumption of nuclear weapon tests.

But all that Pauling has done about it is to record a plea to his friend in the Kremlin to reconsider.

All that Cousins proposes is that the United States take the matter to the United Nations, in the hope of rallying 'world public opinion' (for which Khrushchev gives not a damn—he blew a bomb in the air over Asia yesterday) to make the Kremlin forego testing.

It's nice to have these two on the American side for once, however belatedly and lukewarmly.

But their ideas on meeting the Khrushchev threat are no better than their longstanding proposals that the West cripple itself.

Far preferable in the present situation is the flat statement of Dr. Edward Teller, father of the H-bomb; that the United States cannot survive unless it resumes its own nuclear weapon tests at once.

a) Whether it was true that the State Department had on two occasions rejected his application for a passport (30b; T 103);

b) Whether Senator Dodd in a Senate Internal Security Sub-Committee investigation had said that the then Secretary of State Dean Acheson had denounced a peace group that Dr. Pauling had organized (71b; T 245);

c) Whether it was true that the House Committee on Un-American Activities* had found the peace group "subversive" (44c; T 247);

d) Whether it was true that the House Sub-Committee had found a number of organizations to which Dr. Pauling had belonged to be "subversive" (72b; T 247, 248);

e) To identify on cross-examination the organizations which he was told by the Senate Committee had been identified to him as subversive by the House Committee (44c; T 248);

f) Whether it was true that the Senate Sub-Committee concluded that Dr. Pauling had displayed a "consistent pro-Soviet bias" and that he had "consistently opposed legislation and agencies set up by the American Government to safeguard itself against Communist subversion" (82b-84b; T 322-327).

3. Early in the trial, the court embarked upon a persistent course of conduct which ridiculed and humiliated the plaintiff (12b, T 42; 13b, T 45; 19b, T 55; 19b, 20b, T 65-66; 64c, 65c, T 296, 297). This conduct was climaxed by the court's gratuitous and damaging assertion to the jury that Dr. Pauling did not think he had a special obligation to stick to the truth (77b; T 279, 280). The trial court permitted defense counsel to ask Dr. Pauling whether or not he knew that Professor Thomas Emerson of Yale Law School was known on the Yale campus as

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* Hereinafter referred to as the "House Committee."

"Tommy the Commie" (T 303). The court erroneously accused plaintiff of "flouting" the court's admonitions (35b, 36b; T 120, 121) and generally attempted to belittle the character of plaintiff.

4. In its instructions, the court interpreted the editorial in a manner which denied its libelous thrust. The trial court concluded that being "not on the American side" did not mean that Dr. Pauling was a traitor or unpatriotic —only that he had opposed the political administration in office (5a, 6a; T 542, 543). The court told the jury:

> "Dr. Pauling had a complete right to maintain his position; the Administration had a complete right to maintain its position. The *Daily News* had a right to maintain its position." (6a; T 543)
>
> • • •
>
> "• • • The Daily News may have been right or it may have been wrong, but it had the right to express that opinion." (*id.*)

5. In the absence of any evidence as to the truth of the statements in the editorial, the court failed to give any instructions on the defendant's burden of proof with respect to any of its defenses or on the effect of hearsay evidence used so extensively in the cross-examination of plaintiff.

Opinion of the Court Below

The court below held as follows:

1) There was no error in the charge on the issue of libel as the editorial "did not unambiguously accuse Dr. Pauling of being a Communist or pro-Communist or disloyal" (78c). The court speculated that a proper interpretation could be that Dr. Pauling's conduct may have unwittingly helped the Russian cause and harmed the American and that even though Dr. Pauling did not know Khrushchev, he could be his "friend" if their opinions were in agreement (27, 28);

2) The defendant nonetheless could prove the truth of the alleged libel and could do so by cross-examining plaintiff so that the jury could draw the inference that Dr. Pauling was a Communist sympathizer (28, 29);

3) The defendant could further fall back on its defense of "fair comment" and the partial defense of "mitigating circumstances, including the sources of . . . information and the grounds of . . . belief" under Section 78 of the New York Civil Rights Law (29). Under this defense and on the facts at bar, the court below held that the defendant could show that its editorial was based on a "privileged statement of fact" (30). Thus it could bring out in its defense in this action any material which it would have a privilege to report, such as official acts of the State Department or findings of House or Senate investigating committees (30-32). The court did not discuss the defendant's failure to plead or prove privilege. It held that the defendant would further have the right to rely on these hearsay sources under the New York Civil Rights Law to negative malice (31, 32). This, the court held, would be appropriate even though defendant did not bring out with any particularity the reliance of its editorial writer on the "privileged facts" (33);

4) The court suggested a further reason for the admission of hearsay evidence in averring, "that so many people already considered Dr. Pauling a Communist sympathizer that for the *News* to call him one would cause no more than nominal damage" (31);

5) The court specifically discussed the admissibility of a Report of the Senate Committee of the Judiciary by its Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws even though it was never offered in evidence. The court expressed puzzlement that defendant did not offer the report in evidence (35) but rather chose to get it before the jury

by quoting material from it in questioning plaintiff on cross-examination. The court conceded a problem as to relevance:

> "To be sure, it was scarcely relevant whether Dr. Pauling knew what the Subcommittee had said, but if defendant chose to prove the Subcommittee's statements by the oral testimony of a reader of the report, we find no ground for reversing on that account when no objection under the best evidence rule was made—particularly when it is so plain that proceeding in this manner caused no prejudice." (36)

As to this statement the court ignored the fact that plaintiff's trial counsel was overruled by the trial judge when he vehemently objected to the reading from a document not in evidence (69c; T 313, 314).

6) The court below conceded that the trial court should have given specific instructions as to the limited purpose for which the jury might utilize such hearsay evidence, but since the burden fell upon plaintiff and there was no specific exception to the court's failure to instruct, the "some eight or nine questions" were not too prejudicial to plaintiff's case (39);

7) As to the contention that plaintiff's counsel should have had an opportunity to take the exceptions after the jury had retired, the court below held:

> "Although it would not have been error for him to tell the jury to postpone its deliberations, and recall the court reporter and defense counsel, he was not required to do so" (42);

8) As to appellant's contention of unfairness on the part of the trial judge, the court below said:

> "Although some comments would better have been foregone, the record is far from manifesting such un-

fairness as to warrant our ordering a new trial after a balanced charge and an afternoon's deliberation by the jury" (*id*);

9) The court concluded its opinion with the suggestion that if the foregoing reasons for affirming the trial court had not obtained, there would be sufficient basis in extending the principle established by this court in *New York Times* v. *Sullivan, supra,* to cover a private citizen who expressed himself on controversial public issues (42, 43).

REASONS FOR GRANTING THE WRIT

POINT I

The Court below erroneously innovated an area of "privileged fact" as available to a defendant in a libel action on a plea of truth and fair comment, which is contrary to the statute and decision law of New York.

The court stated:

> "Reports of Dr. Pauling's activities which the hearsay rule would render inadmissible to prove truth might be admissible for various purposes with respect to this defense [fair comment]. One would be to show that the comment was upon a 'privileged statement of fact' " (81c).

In a footnote quote from Harper & James, *The Law of Torts,* the court rightly concluded that fair comment must be on facts "truly stated or privileged" (30, 31 n. 6). The latter word is italicized. The court reasoned that since the defendant newspaper would have been privileged in reporting executive action or legislative hearings, it could rely on that right at the instant trial, even though it was not contended that the editorial was a report of any such

official action or hearings. The conclusion stated in the editorial—that Dr. Pauling had displayed a consistent "pro-Soviet bias", and similar statements—were thus transformed into "privileged facts".

Section 337 of the Civil Practice Act (now Section 74 of the Civil Rights Act) established the exclusive grounds for the invocation of privilege as a defense in a libel case. The section permits "the publication of a fair and true report of any . . . legislative proceeding or other official proceeding . . . But the "section does not apply to a libel contained in any other matter . . ."

Where upon the face of the article it appears not to have been a report, the defense is not available. *Stevenson* v. *News Syndicate Co., Inc.*, 302 N. Y. 81, 88 (1950); *Stuart* v. *Press Pub. Co.*, 83 App. Div. 467 (1903); *Kelley* v. *Hearst Corp.*, 2 A. D. 2d 480, 483 (1956); *Vosbury* v. *Utica Daily Press Co.*, 105 Misc. 134 (1918); *Smith* v. *New Yorker Staats Zeitung*, 154 App. Div. 458 (1913); *Naegele* v. *MacFadden Publications, Inc.*, 161 Misc. 684 (1936); *Van Arsdale* v. *Time, Inc.*, 35 N.Y.S. 2d 951 n.o.r. aff'd 265 App. Div. 413 (1942); *Seelman, The Law of Libel and Slander In The State of New York*, Section 216 (1941).

Section 337 of the New York Civil Practice Act was a codification of the general rule on the subject of privilege which has been followed by the federal courts.

Hughes v. *Washington Daily News Co.*, 193 F. 2d 922, 923 (CADC, 1952) rejected the notion that any facts are privileged if the publication does not reveal on its face that it is a report of some official proceeding:

> " 'It is well settled that the publication of any statement by a newspaper made upon its own authority, and not purporting to be a report' of official proceedings or statements 'is not privileged * * *. The publication constitutes a charge by the person uttering it, and he is responsible therefor' [citing cases]"

Hughes was followed in *Venn* v. *Tennessean Newspapers, Inc.*, 201 F. Supp. 47, 56 (D. Tenn., 1962) aff'd 313 F. 2d 639 (CA 6, 1963), cert. denied 374 U. S. 830 (1963). The Court there stated:

> "The articles show on their face that they are not reports of such proceedings but rather are accounts, or probably more accurately partial and fragmentary accounts, of speeches made by Senator Kefauver and a Kefauver supporter in Memphis.
>
> "Also without merit is the defense that the defendant had the qualified privilege to comment fairly and reasonably upon a matter of public interest. It is well settled that the privilege of fair comment does not apply to statements of fact but only to comments upon facts or expressions of views or opinions."

Judge Yankwich in a lengthy analysis of the problems involved in this area in *Golden North Airways* v. *Tanana Publishing Company*, 218 F. 2d 612, 627 (CA 9, 1954), asserted:

> "At times 'fair comment' and 'privileged publications' are used synonymously. But, in reality, they are not the same. For in privileged publication there would be libel but for the privileged occasion—while fair comment is not libel" [citing authorities].

It is submitted that the court below fell into the error anticipated by Judge Yankwich and confused the defense of fair comment with the separate defense of "privileged communication" which the court below called "privileged facts".

Cresson v. *Louisville Courier-Journal*, 299 Fed. 487 (CA 6, 1924), which the court below cited as authority for its assertion that there are "privileged facts", comment on which is immune from libel accountability, involved a newspaper "account of the majority report of [a] . . . committee appointed by Congress."

The effect of the decision of the court below is to establish a new defense in libel action. A defendant may now plead fair comment and then rely for proof thereof on statements taken from Congressional or other official reports even though in the purportedly libelous article there is no mention of the so-called privileged material.

Such a new rule is at variance with the law of New York and is inconsistent with the law of libel as interpreted by other federal courts.

POINT II

The court below wrongly ruled that reports of Congressional Committees were admissible in evidence as a defense to a libel action in the case at bar because:

a) No Congressional reports were offered or admitted in evidence at the trial. Conclusions purportedly read from such reports were embodied in questions put in cross-examination to plaintiff and to which objections were taken and overruled;

b) The defendant could not establish reliance on the plaintiff's knowledge of the conclusions on which he was cross-examined, yet the court justified such cross-examination under the New York statute relating to this defense;

c) There is a conflict between the Courts of Appeal as to the admissibility of House Committee and Senate Internal Security Subcommittee reports in the defense of a libel action in view of their hearsay character and their possible prejudicial effect;

d) The increasing volume of such Congressional reports embodying derogatory conclusions concerning individuals, not based on the standards of due process, require this court to review the purposes for which they may be used as evidence.

It is significant that, in the case at bar, defendant presented what the court below calls "privileged facts" to the jury—not by offering such official reports into evidence—but by detailed cross-examination over the objection of plaintiff on the derogatory conclusions concerning him purportedly held by the Passport Office of the State Department, the Senate Internal Security Subcommittee and the House Committee. Nor did the defendant ever connect up this cross-examination with its own reliance on such reports. Logically, this would be impossible since plaintiff's knowledge of these derogatory conclusions could not be imputed to the defendant's editorial writer.

The court below gives an additional justification for this cross-examination:

> "A still broader basis for the admission of evidence which was inadmissible as hearsay on the defense of truth is suggested by the point, apparently asserted by the News' Fourth Defense, that so many people already considered Dr. Pauling a Communist sympathizer that for the News to call him one would cause no more than nominal damage. Hence the argument runs, evidence of previous reports freely circulated about the victim of the libel are admissible regardless of their truth to show how he was generally considered" (31)

If this be true, New York has indicated that it will scrutinize the nature of the proof in connection with the libelous charge. See *Crane* v. *N. Y. World Telegram,* 308 N. Y. 470 (1955).

Indeed, the admissibility of such evidence for any purpose is highly questionable. It has long been held that:

> "The mere fact that an opinion is widespread may mean no more than that some earlier libel has been unusually successful. But even if that not be so, to

> make widespread opinions of others—even expert opinions—an exculpating basis for continued and repeated libels would mean that the person injured may be deprived of all remedy to establish the truth and stop the libel'' *Dolcin Corp.* v. *Reader's Digest Ass'n., Inc.*, 7 A. D. 2d 449, 456 (1959). See also, *Shenkman* v. *O'Malley*, 2 A. D. 2d 567 (1956); *Sun Printing & Publishing Ass'n.* v. *Schenck*, 98 Fed. 925 (CA 2, 1900); *Tribune Assn.* v. *Follwell*, 107 Fed. 646 (CA 2, 1901); *Cf. Abell* v. *Cornwall Industrial Corp.*, 241 N. Y. 327 (1925).

Such scrutiny was absent in the case at bar where the defendant at no time sought to introduce such reports in evidence. The court below further stated that such ''evidence'' would be admissible as mitigating circumstances including sources of information under Section 78 of the New York Civil Rights Law. Yet the record shows that no such ''evidence'' was ever introduced. The court below had to go to counsel after argument of the case on appeal to request a copy of the legislative reports used in the cross-examination of plaintiff, apparently in an effort to satisfy itself that the questions asked had been suggested by the contents of the documents.

Having thus misconceived the issue, the court below analyzed the instances in the record of the cross-examination of plaintiff in the light of this new-fangled and plainly erroneous libel doctrine predicated on the mysterious immunity of ''privileged facts'' [see Point I *infra*].

It said:

> ''The action of the State Department in rejecting a passport application, which would normally be granted as a matter of course, was admissible to show that the editorial was an opinion based on a 'privileged fact', to negative malice, and to show mitigating cir-

> cumstances under Section 78 of the New York Civil Rights Law*'' (32).

The Court of Appeals followed this statement with an even more obtuse *non sequitur:*

> "Since a statement of grounds by the Department would have been similarly admissible, it would be straining at the gnat to take a different view with respect to a public attribution of grounds by Dr. Pauling himself'' (32, 33).

The Court of Appeals then conceded, by calling it a "possible chink in defendant's armor'' (33), that there was no evidence that the author of the editorial knew of this episode when he wrote his editorial. It considered sufficient a general statement that the author refreshed his memory on clippings about Dr. Pauling from the *Daily News* library files.

Extrapolating from the above, it would now appear that the rule in the Second Circuit is that a cross-examination question embodying a hearsay derogatory conclusion is appropriate in a libel suit to support a defense of mitigation or reliance on reliable sources even though it is never established that the writer of the alleged libel knew of that derogatory conclusion when he wrote the article.

This is contrary to the rule followed by the New York courts *Carpenter* v. *New York Evening Journal,* 96 App. Div. 376, 382 (1904); *Burnham* v. *Hornaday,* 130 Misc. 207 (1927); *Collis* v. *Press Publishing Co.,* 68 App. Div. 38 (1902); *Kehoe* v. *New York Tribune, Inc.,* 229 App. Div. 220 (1930).

Nor could the Congressional Reports have been used to prove the truth of the facts contained in them. *People* v.

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* There was no evidence that the State Department action was known to the editorial writer nor did the trial or appellate court consider this relevant.

Stilwell, 244 N. Y. 196 (1926); *Bradley* v. *O'Hare*, 11 A. D. 2d 15 (1960); *Dolcin Corp.* v. *Reader's Digest Ass'n. Inc.*, *supra*. Yet the defendant's counsel used these prejudicial and damaging hearsay conclusions as evidence of the truth in his opening and closing to the jury and throughout the trial (T 25-35; T 489-497; T 504-511).

As to the admissibility in evidence of legislative reports or official documents in a libel suit even for limited purposes, there is an apparent conflict between Circuit Courts. In *Hartmann* v. *American News Co.*, 171 F. 2d 581, 586 (CA 7, 1948), cert. denied 337 U. S. 907 (1949), the Court of Appeals for the Seventh Circuit approved of the admission in evidence by the defendant of a report of the House Committee for the limited purpose of showing that it might have caused the injury to plaintiff's reputation complained of, rather than the article claimed to be libelous.

In approving of the admissibility of this evidence, the court emphasized the limited purpose for which it would be admitted and stressed the fact that appropriate instructions in that regard were given.

In *Utah State Farm Bureau Federation* v. *National Farmers Union Service*, 198 F. 2d 20, 25 (CA 10, 1952), the Court of Appeals for the Tenth Circuit upheld the trial court's exclusion of portions of the Congressional Record which had been offered in defense of an action for libel and slander and in mitigation of damages. The court there took open issue with *Hartmann*:

> "In *Hartmann* v. *American News Co.*, 7 Cir. 171 F. 2d 581, the appellate court sustained the trial court's admission of contemporary publications of like tenor in mitigation of damages for libel per se. But, the weight of authority is to the effect that contemporary libels are not admissible to mitigate damages for libels per se [citing authorities]. It is said that 'libels by the others neither add to nor detract from the wrong of the defendant. Consequently, it cannot be material

whether these other wrongful acts have been committed previously or subsequently to that of the defendant, unless the proposition can be maintained that the reputation of the aggrieved party, having already been shattered by the previous libels, is less susceptible of further injury, and therefore that the evidence should be admitted as tending to reduce the damages. The answer to this proposition is that it is purely hypothetical, and is without any sanction in practical experience.' "

On top of this apparent conflict between the Seventh and Tenth Circuits, the Second Circuit has now heaped additional confusion with this holding. The Seventh Circuit which upheld in *Hartmann* the introduction into evidence of a Report of the House Committee emphasized that its approval rested on the jury being properly instructed as to the limited purpose for which the evidence was admitted. In the case at bar the record is barren of any instructions as to how the jury should consider the extensive, and damaging to plaintiff's cause, hearsay evidence it had heard. Proper instructions were offered but refused (38, 39).

This court has recognized the far reaching effects of the listing as subversives of thousands of persons without the rudiments of judicial due process where the primary motive of the Congressional Committee is to hold persons up to public stigma, scorn and obloquy *Watkins* v. *United States*, 354 U. S. 178, 195-199 (1956); *Barenblatt* v. *United States*, 360 U. S. 109, 157-160 (1958) (dissent by Mr. Justice Black); see Judge Clark's dissent in *United States* v. *Josephson*, 165 F. 2d 82, 93 (CA 2, 1947), cert. denied 338 U. S. 838 (1948).

The ruling of the court below gave such rumor-shrouded findings the ring of truth in the extensive cross-examination of plaintiff even though they could not have been offered for proof of truth, cf. *Stasiukevich* v. *Nicolls*, 168 F. 2d 474 (CA 1, 1948).

POINT III

The court below was in error in attempting to apply the holding in *New York Times* v. *Sullivan*, 376 U. S. 254 (1964) to the facts of the case at bar.

The court below as an alternative holding, ruled that the immunity, short of malice, given a citizen or the press to criticize a public official acting in the line of his official duty extends to the criticism of a private citizen speaking out on public affairs. Thus, if a private citizen chooses to assert himself or express an opinion on an issue affected with the public interest, the press has a license to criticize him without regard for the truth of the criticism or the defamatory nature of the opinion expressed.

The implication of the long last paragraph of the court's opinion is that a newspaper is protected against an action for defamation so long as a public issue is involved in the alleged defamatory material. This would effectively change the law of defamation as generally defined and as controlled by statute in New York. This assumption is implicit in the court's innovation of an area of "privileged fact", discussed *infra*.

The reasoning of the Court of Appeals further represents a misapplication and misconception of the *Sullivan* case which did not purport to deny a private citizen his common law rights to recover for libel in the face of false defamatory unprivileged statements of fact concerning him. The *Sullivan* case was restricted to press criticism of a public official.

The ruling of the Court of Appeals on each of the issues raised by the petitioner reflects a premise which the last paragraph of its opinion makes explicit. It would deny the "existence of the deep-rooted policy of the common law generally to provide redress against defamation".*

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* Quoted from Mr. Justice Brennan's dissent in *Barr* v. *Matteo*, 360 U. S. 564, 586 (1958).

POINT IV

The trial court's prejudice against plaintiff's case was obvious throughout the trial, was unjudicial and deprived plaintiff of a fair trial.

Early in the trial, the court set out on a consistent course of demeaning the plaintiff's stature, reputation and cause. The court's derogatory remarks ranged from the apparently inconsequential to matters central to plaintiff's case. The record reveals a gathering momentum of prejudice against plaintiff expressed increasingly more often by the trial court as the trial progressed.

In this hostile atmosphere, the court permitted defense counsel to refer to a Professor of Law at Yale, Thomas Emerson, who had been associated with plaintiff, as "Tommy the Commie", in counsel's effort to prejudice the jury against the plaintiff. This was without disapproval or admonition to defense counsel, in the face of objection (T. 303).

A climax to the court's prejudicial intervention in the case came when the court, in effect, called Dr. Pauling a liar. When, on cross-examination, the plaintiff stated that,

> "The editors of a great newspaper have a special obligation to stick to the truth" (T. 279)

the court announced:

> "But you don't think you do?" (T. 280)

Thus, if the jury had respect for the court's opinion, it could only believe that the plaintiff felt no obligation to tell the truth. It would follow that if the plaintiff were a liar, he could well be a Communist, a traitor and an undisclosed friend of Khrushchev's. Under these circumstances he could not have a fair trial. *Quercia* v. *United States,* 289 U. S. 466 (1933).

Justice requires that this court exercise its supervisory authority over the conduct of Federal District Court Judges to prevent repetition of such unjudicial conduct.

POINT V

The trial court's instructions were tantamount to a directed verdict and were in conflict with the law of New York and the general law concerning libel.

A) The language of the editorial was not susceptible to the interpretation given by the court.

The libel, by its very language, defamed the character of the plaintiff. It charged him with insincerity where it stated that Dr. Pauling "now profess(es) to be horrified by Khrushchev's announcement of Soviet resumption of nuclear weapon tests." It stated that he was a friend of Khrushchev, indicating that he was friendly to Communists (no evidence was adduced that he had ever met the then Soviet Premier).

When the article said "it's nice to have [plaintiff] on the American side for once, however belatedly and lukewarmly" the clear meaning in the context was that Dr. Pauling had previously been not on the American side but disloyal, a traitor and a Communist sympathizer. It further accused him of proposing "that the West cripple itself," a further accusation of disloyalty or treason. Thus, the editorial was defamatory of the plaintiff's reputation as a public figure, scientist and citizen.

The false charge that a person is a Communist or sympathetic to Communism or a traitor is libelous *per se* under New York law. *Mencher* v. *Chesley,* 297 N. Y. 94 (1947); *Toomey* v. *Farley,* 2 N. Y. 2d 71 (1956); *Grant* v. *Readers Digest Ass'n, Inc.,* 151 F. 2d 733 (CA 2, 1945); *Wright* v. *Farm Journal, Inc.,* 158 F. 2d 976 (CA 2, 1948); *Foltz* v. *News Syndicate Co., Inc.,* 114 F. Supp. 599 (S.D.N.Y. 1953); cf. *Seested* v. *Post Printing & Publishing Co.,* 326 Mo. 559 (1930).

Yet, in its charge to the jury, the trial court stretched the meaning of the *News'* plain language to say it could be taken as saying that Dr. Pauling had merely opposed the political administration in power.

B) The court in effect told the jury to bring in a verdict for the defendant.

Further, the trial court told the jury categorically that although plaintiff had a right to maintain his position, the defendant newspaper had a right to maintain its position and to express its opinion.

Under such instructions, the jury could not find that the defendant had uttered a libel since there can be no libel if the defendant had a right to say what it said.

C) The trial court failed to direct the jury on the issue of burden of proof.

Although the defendant sought to establish, by questioning of plaintiff on cross-examination, that the statements made in the editorial were true, i.e., Pauling was really a Communist or a Communist-sympathizer, no competent evidence of such truth was adduced at the trial. Nonetheless, there were no instructions given to the jury as to the defendant's burden of proof as required under New York law. See *Seelman, supra,* Section 543; *Carpenter* v. *New York Evening Journal,* 96 App. Div. 376 (1904); *Mayer* v. *Chamberlain,* 173 App. Div. 326 (1917).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ELEANOR JACKSON PIEL,
Attorney for Petitioner.

Of Counsel:
SANFORD M. KATZ,
DONNER & PIEL.

APPENDIX A

Statutes Involved

Section 337 of the New York Civil Practice Act:

> "A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published.
>
> This section does not apply to a libel contained in any other matter added by any person concerned in the publication; or in the report of anything said or done at the time and place of such a proceeding which was not a part thereof. Added L. 1962, c. 310, Section 61, eff. Sept. 1, 1963."

(Now codified as Section 74 of the Civil Rights Law of New York.)

Section 78 of the Civil Rights Law of New York:

> "In any action for libel or slander, the defendant may prove mitigating circumstances, including the sources of his information and the grounds for his belief, whether or not he has pleaded or attempted to prove any defense. A defendant in default for want of an answer may prove such mitigating circumstances upon a reference or inquiry to ascertain the amount of the plaintiff's damages. Matter tending only to mitigate or reduce damages is a partial defense and may be set forth in the answer. Added L. 1962, c. 310, Section 64, eff. Sept. 1, 1963."

[74c]

Appendix B.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 301—September Term, 1963.

(Argued March 18, 1964 Decided July 7, 1964.)

Docket No. 28436

LINUS PAULING,

Plaintiff-Appellant,

—v.—

NEWS SYNDICATE COMPANY, INC.,

Defendant-Appellee.

Before:

LUMBARD, *Chief Judge,*
FRIENDLY and HAYS, *Circuit Judges.*

Appeal by plaintiff in a libel action from a judgment of the District Court for the Southern District of New York, Archie O. Dawson, *Judge,* dismissing his complaint after a verdict for defendant. Affirmed.

ELEANOR JACKSON PIEL (Donner & Piel), New York, New York (Sanford M. Katz, of Counsel), *for Plaintiff-Appellant.*

J. HOWARD CARTER (Townley, Updike, Carter & Rodgers, New York, New York) (Andrew L. Hughes, Anson M. Keller, of Counsel), *for Defendant-Appellee.*

Appendix B.

[75c] FRIENDLY, *Circuit Judge:*

Dr. Linus Pauling appeals from a judgment of the District Court for the Southern District of New York dismissing his complaint in an action for libel against the publisher of the New York Daily News after a verdict for the defendant. Federal jurisdiction is founded upon diverse citizenship. The principal claims are (1) error in submission of the defamatory nature of the publication to the jury, (2) the reception of evidence contended to be banned by the hearsay rule and failure to give proper instruction in regard to it, and (3) general unfairness by the trial judge. We affirm.

The alleged libel was an editorial published by the New York Daily News on September 2, 1961, shortly after the announcement of resumption of nuclear tests in the atmosphere by the Soviet Union. The article, which also contained photographs of the two persons named, is set forth in the margin.[1]

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[1] TWO JOHNNY COME-LATELIES

For years, a couple of semi-prominent American loudmouths have been agitating against nuclear weapons and weapon tests—the best defense the West has against Soviet Russian and Chinese Red manpower.

The pair are Linus Pauling, a California biochemist who once won a Nobel Prize, and Norman Cousins, editor of something called the Saturday Review.

Cousins and Pauling now profess to be horrified by Khrushchev's announcement of Soviet resumption of nuclear weapon tests.

But all that Pauling has done about it is to record a plea to his friend in the Kremlin to reconsider.

All that Cousins proposes is that the United States take the matter to the United Nations, in the hope of rallying "world public opinion" (for which Khrushchev gives not a damn—he blew a bomb in the air over Asia yesterday) to make the Kremlin forego testing.

It's nice to have these two on the American side for once, however belatedly and lukewarmly.

But their ideas on meeting the Khrushchev threat are no better than their longstanding proposals that the West cripple itself.

Far preferable in the present situation is the flat statement of Dr. Edward Teller, father of the H-bomb: that the United States cannot survive unless it resumes its own nuclear weapon tests at once.

[76c] The answer denied that the article was defamatory and also pleaded various defenses, three of which are important on this appeal. A Third Defense alleged that "Insofar as the editorial complained of contains statements of fact relating to plaintiff, such facts are true in substance and in fact and insofar as it consists of comments, such comment is fair comment about such facts and relates to matters of public interest," was published in good faith and without malice toward plaintiff, and expressed defendant's honest opinion. A Fourth Defense asserted that plaintiff, having achieved a good professional reputation in education and scientific research, "became an outspoken advocate of causes, policies, organizations and individuals sympathetic to communism, and he sought wide-spread publicity for such advocacy," thereby creating "for himself a reputation that could not and did not suffer any damage by reason of the editorial complained of." A Sixth Defense set forth that the opinions expressed in the editorial "were based on information communicated to defendant by reliable persons and from reliable sources including prior publications (i) of legislative investigating committees of the United States of America and of the State of California, and (ii) of reputable news media" believed to be true by defendant, which published the editorial in good faith in the ordinary course of business and without malice.

Testimony of Dr. Pauling on direct and cross-examination developed his long and extensive pacifist efforts, including membership in "ten or twenty peace organizations," and, more particularly, his endeavors to stop nuclear testing. These included the submission of a petition by scientists to the United Nations to stop the testing of nuclear bombs in 1958;[2] his initiation in 1958 of an action in the District of

[2] The petition urged "that an international agreement to stop the testing of nuclear bombs be made now." The News stressed there was no mention of inspection; Dr. Pauling contended this was implicit in the reference to an international agreement.

[77c] Columbia to enjoin the Secretary of Defense and other government officers from testing, regardless of what other nations were doing; his prosecution of this action, see *Pauling* v. *McElroy*, 278 F. 2d 252 (D. C. Cir.), cert. denied, 364 U. S. 835 (1960), after unsuccessful efforts to lodge similar actions in Great Britain and the Soviet Union; discussing a test ban agreement with the ambassadors of the United States, Great Britain and the Soviet Union who were engaged in negotiations at Geneva; thereafter publicly stating that the Eisenhower administration was not putting forth its best efforts to obtain a test ban agreement, although making no similar charge with respect to the Soviet Union, and stating also his disappointment that the Kennedy administration during its first few months had not taken any significant action in the direction of a bomb test agreement. When the Soviet Union announced the resumption of nuclear testing in August, 1961, Dr. Pauling sent a letter and a telegram asking Premier Khrushchev to reconsider; he also wrote President Kennedy suggesting "that the United States might be able to refrain from resuming the testing of nuclear weapons, even though the Soviet Government might resume this testing, and by refraining the United States might not be significantly damaged in a military way and would benefit immensely through the impact of our moral position." This was the background for the editorial.

(1) Judge Dawson told the jury that the first issue of fact it must decide was whether the editorial imputed "that Dr. Pauling is either disloyal or a Communist, or a Communist sympathizer." He said that "To accuse a man of being a traitor to his country, or of being a Communist or pro-Communist, is, of course, libelous," and that Dr. Pauling contended this was what the article meant. He then explained the News' contention that the article meant only that the policy of the United States had been to have nuclear

[78c] weapons and weapon tests so long as there was no international agreement with adequate safeguards, and that as to this Dr. Pauling had not been "on the American side." Such an accusation, the judge charged, would not be libelous. The jury must thus determine whether the editorial "would convey to the ordinary man that Dr. Pauling had been a traitor to the United States, or was pro-Communist or anti-American, or whether it indicated, on the contrary, that he had merely expressed a view different from that of the particular government in power at that time."

We find nothing wrong with this charge. It is true that "If the language of a publication is unambiguous the question whether it is libelous per se is for the court" and that "it is libelous under New York law to write of a lawyer that he has acted as agent of the communist party and is a believer in its aims and methods," *Wright* v. *Farm Journal, Inc.*, 158 F. 2d 976, 978 (2 Cir. 1947). But the editorial here did not unambiguously accuse Dr. Pauling of being a Communist or pro-Communist or disloyal, although it could be so understood. The passages particularly relied on by the plaintiff are the reference to Premier Khrushchev as Dr. Pauling's "friend in the Kremlin" and the statement about now having Dr. Pauling "on the American side for once." But these must be read against the editorial's opening sentence truthfully stating that Dr. Pauling had long been "agitating against nuclear weapons and weapon tests" which the writer regarded as "the best defense the West has against Soviet Russian and Chinese Red manpower." The statements could carry at least two interpretations which were not defamatory: one that Dr. Pauling's public agitations although not motivated by disloyalty, had unwittingly resulted in helping the Russian cause and harming the American; the other, even more innocuous, that Dr. Pauling was Khrushchev's "friend" in the sense that their opinions were often in agreement and that he was "on the American

[79c] side for once" in that his views had usually been opposed to the official American Government position on disputed questions. The case was thus one where, under New York law, a jury might find the editorial defamatory, *Sweeney* v. *United Feature Syndicate, Inc.*, 129 F. 2d 904 (2 Cir. 1942); *Grant* v. *Reader's Digest Ass'n*, 151 F. 2d 733 (2 Cir. 1945), cert. denied, 326 U. S. 797 (1946); *Mencher* v. *Chesley*, 297 N. Y. 94 (1947); *Toomey* v. *Farley*, 2 N. Y. 2d 71, 78, 156 N.Y.S. 2d 840, 845 (1956),—not one where the judge ought instruct that it was. Save when words are necessarily defamatory, "It is for the court in the first instance to determine whether the words are reasonably capable of a particular interpretation; it is then for the jury to say whether they were in fact so understood," Prosser, Torts 581 (1955); 1 Harper & James, The Law of Torts 463-64 (1956).[3]

(2) Despite its position that the editorial did not in fact accuse Dr. Pauling of being a Communist or a pro-Communist, the News had to recognize that the jury might think otherwise. It could defend against that possibility by proving the truth of the allegedly defamatory statement. In support of the defense of truth the News brought out on

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[3] The brief of Dr. Pauling's appellate counsel points to another possibly defamatory feature of the editorial, namely, the statement that Dr. Pauling "now profess[es] to be horrified" by the announced Soviet resumption of nuclear testing. This is claimed to be a charge of insincerity that would be actionable in itself, as well as to give added color to the reading that Dr. Pauling was working on behalf of the Soviet Union. But, although "profess" often carries the implication of insincerity, it does not inevitably do so; insofar as this sentence may have given added weight to the argument that the editorial charged Dr. Pauling with being pro-Communist, it was before the jury along with everything else; and the judge was not asked to charge that the jury might find the editorial defamatory in alleging hypocrisy *simpliciter*. To the contrary, plaintiff's trial counsel told the jury in summation, in words which the judge quoted, "I say to you if you cannot infer, or if you cannot understand that editorial to impute that Dr. Pauling is either disloyal or that he is a Communist, or a Communist sympathizer, then there is nothing to this case."

[80c] cross-examination of Dr Pauling a considerable number of items from which the jury could draw the inference that he was in fact a Communist sympathizer; from the News' standpoint it was important that this be done in some detail since the accumulation of instances might support an inference unwarranted from any one. The major portion of the trial was therefore devoted to questions intended to bring out Dr. Pauling's past association with Communist sympathizers and activies.[4]

The News was not required however to stake everything on the jury's accepting the defense of truth; it could fall back on its Third Defense of fair comment, and upon partial defenses including matters going to the extent of the damage and, under a New York statute, "mitigating circumstances, including the sources of . . . information and the grounds of . . . belief."[5] An extra-judicial assertion which the hearsay rule would bar as proof of the matter asserted may be admissible to establish one or more of these defenses on the basis that it is being "offered, not as an assertion to evidence the matter asserted, *but without reference*

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[4] Dr. Pauling's admissions included, among other things, that he had frequently intervened publicly on behalf of Communists or pro-Communists—the defendants in *United States* v. *Dennis*, their lawyers when cited for contempt, Julius and Ethel Rosenberg, Morton Sobell, the "Hollywood Ten" contempt defendants—and the Communist Party itself, sometimes at his own instance or on that of friends and sometimes at the instance of Communist or Communist front organizations; that he had chaired a committee to welcome the "Red Dean" of Canterbury in Los Angeles; that he had advocated repeal of the Smith Act; that he had belonged to organizations later classified as subversive by the Attorney General or the House Un-American Activities Committee; and that he had paid for an advertisement that a Senate Subcommittee investigating his affiliations with Communist front organizations was a disgrace to Congress, the nation and the American people.

[5] The News' brief cites this as § 78 of the Civil Rights Law, which became effective only September 1, 1963. However, similar provisions of Civil Practice Act, §§ 338 and 339, were in effect at the time of the alleged libel and of the trial. For convenience we shall refer to the existing statute.

[81c] *to the truth of the matter asserted,*"—in other words, that the fact of the offered utterance is relevant in and of itself, regardless of its truth. See 6 Wigmore, Evidence § 1766 (3d ed. 1940); McCormick, Evidence, 463 (1954); Morgan, A Suggested Classification of Utterances Admissible as Res Gestae, 31 Yale L. J. 229, 231-32 (1922); Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177, 199 (1948).

The privilege of "fair comment," the so-called "rolled up" plea, Gatley, Libel and Slander, 477-78 (1960 ed.), is defined in A. L. I. Restatement, Torts, § 606, as follows:

> "(1) Criticism of so much of another's activities as are matters of public concern is privileged if the criticism, although defamatory,
>
> (a) is upon,
>
> (i) a true or privileged statement of fact, or
>
> (ii) upon facts otherwise known or available to the recipient as a member of the public, and
>
> (b) represents the actual opinion of the critic, and
>
> (c) is not made solely for the purpose of causing harm to the other."

Reports of Dr. Pauling's activities which the hearsay rule would render inadmissible to prove truth might be admissible for various purposes with respect to this defense. One would be to show that the comment was upon a "privileged statement of fact";[6] on this basis it was proper for the

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[6] 1 Harper & James, The Law of Torts 458-59 (1956), explains that in the usual case the defense of fair comment exists only as to the criticism and not as to the facts themselves, and that the latter must be "truly stated *or privileged* or otherwise known either because the facts are of common knowledge or because, though perhaps unknown to a particular recipient of the communication, they are readily accessible to him." Although the cases cited do not

[82c]News to introduce reports of legislative and executive proceedings to show the "privileged facts" that formed a basis for its comment. If the News relied on such reports, these would also be admissible, again regardless of their truth, to show that the comment was "not made solely for the purpose of causing harm," in other words to negative "malice."

A still broader basis for the admission of evidence which was inadmissible as hearsay on the defense of truth is suggested by the point, apparently asserted by the News' Fourth Defense, that so many people already considered Dr. Pauling a Communist sympathizer that for the News to call him one would cause no more than nominal damage. Hence, the argument runs, evidence of previous reports freely circulated about the victim of the libel are admissible, regardless of their truth, to show how he was generally considered. We are not required to decide whether, as a matter of common law, New York would follow the majority in *Bell* v. *Parke*, 11 Ir. C. L. 413 (1860), in excluding such evidence, see 1 Wigmore, Evidence (3d ed.) § 79—on the ground that despite the strict logic favoring admission, the danger of confusion is too great—but see *King* v. *Root*, 4 Wend. 114, 139-40, 158; *Hamer* v. *McFarlin*, 4 Denio, 509 (1847), or whether, even if so, the evidence might still be

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throw light on what is meant by "privileged facts," the thought must be that if publication of the "facts" themselves would not be actionable because protected by a privilege, such as the privilege for reports of legislative and executive proceedings, ALI Restatement, Torts, § 611; *Cresson* v. *Louisville Courier-Journal*, 299 Fed. 487 (6 Cir. 1924), current or subsequent comment based on such "facts" is also protected. See Gatley, Libel and Slander, 335-36, and *Mangena* v. *Wright*, [1909] 2 K. B. 958, 976-77. Thus, as applied to this case, the News would have been privileged to call Dr. Pauling a Communist sympathizer in commenting on the statement of facts in the Report of the Senate Subcommittee in March, 1961, referred to below, and also to use that statement as a basis for making the same accusation à-propos of his letters and telegram in September. It was thus permissible for the News to show for this purpose what the statement was.

[83e] admissible under F. R. Civ. Proc. 43(a), at least where it took the form of official reports as distinguished from mere gossip. See *Hope* v. *Hearst Consol. Publications, Inc.*, 294 F. 2d 681 (2 Cir. 1961), cert. denied, 368 U. S. 956 (1962). For evidence that the News relied on statements from federal executive departments and Congressional committees about Dr. Pauling's activities would surely qualify under the Sixth Defense as "mitigating circumstances, including the sources of . . . information and the grounds for . . . belief . . ." under § 78 of the New York Civil Rights Law. *Danziger* v. *Hearst Corp.*, 304 N. Y. 244 (1952) [testimony in court proceeding]; *Kenna* v. *Daily Mirror, Inc.*, 250 App. Div. 625, 629, 295 N. Y. Supp. 219, 224 (1st Dept.) aff'd 276 N. Y. 483 (1937) [articles in other newspapers].

We are now ready to consider the first episode. The News was allowed to bring out on cross-examination of Dr. Pauling that twice in 1952 the State Department rejected his application for a passport; that on one of these occasions Dr. Pauling issued a statement to the press that "The action of the State Department was based on suspicion that I was a Communist and because anti-Communist statements by me have not been sufficiently strong"; and that this was what Dr. Pauling believed. There was no objection to any of this as hearsay; counsel objected to the question on rejection as "too far afield," made no objection to the question as to the press statement, and objected to the question of Dr. Pauling's belief without saying why. The action of the State Department in rejecting a passport application, which would normally be granted as a matter of course, was admissible to show that the editorial was an opinion based on a "privileged fact," to negative malice, and to show mitigating circumstances under § 78 of the New York Civil Rights Law. Since a statement of grounds by the Department would have been similarly admissible, it

[84c] would be straining at the gnat to take a different view with respect to a public attribution of grounds by Dr. Pauling himself. Whether Dr. Pauling believed in the truth of his press statement was indeed irrelevant, but allowing him to say that he did was not prejudicial if there was no error in what had gone before. A possible chink in defendant's armor is the lack of particularized evidence that Maury, the author of the editorial, knew of this episode when he wrote the editorial. Maury testified[7] that, before writing, he "got the clippings on Pauling, sort of ran through them to refresh my memory, which was pretty clear on him, anyway," and that "our library files contain everything that comes along about any subject that it has files on." In the absence of any evidence to the contrary, these general statements warranted the conclusion that Maury was informed of the facts. At least this was so when the objection was so vague as to give defendant no clue that any deficiency could be cured by a question to Maury. 1 Wigmore, Evidence, § 18, pp. 321-22, 332-38; McCormick, Evidence, 117-18. There was thus no error in receiving this evidence; whether there was error in failing to instruct the jury as to the issues on which it could be considered will be discussed below.

The next piece of cross-examination now contended to have violated the hearsay rule consists of two questions asking Dr. Pauling whether statements had been published in the press and made "in the Halls of Congress" that he had followed the Communist Party line, which he answered in the affirmative. It is sufficient at this point to say that no objection to these questions was made.

Passing instances where Dr. Pauling was asked whether he knew that various organizations with which he had been connected had been found subversive by the Un-American

[7] Maury was called by the plaintiff and was examined only by him.

[85c] Activities Committee or the Attorney General, which were admissible as a basis of fair comment, we arrive at a subject of more extended complaint. Defense counsel had marked for identification a Report to the Senate Committee on the Judiciary by its Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws, entitled "Testimony of Dr. Linus Pauling, June 21 and October 11, 1960." After eliciting that Dr. Pauling had been subpoenaed to appear before the Subcommittee,[8] defense counsel, without objection, brought out that some newspapers had published the Subcommittee's report. He then asked: "Q. Did this Senate Committee conclude that in your statements and your attitudes before the Committee you had displayed a consistent pro-Soviet bias?", to which plaintiff's counsel objected as "hearsay and conclusion." When the judge ruled, "Well, he is asking this witness. He is not putting in this report. He is asking this witness if that is the conclusion," Dr. Pauling answered that the conclusion was one with which he disagreed. Then, after some further interchange, defense counsel propounded a series of questions, of which the following is typical:

"Q. Now, based upon the Subcommittee's interrogation of you, did it conclude that you in the course of

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[8] The Subcommittee Report recited Dr. Pauling's unsuccessful efforts, between his two appearances, to have the subpoena quashed, see *Pauling* v. *Eastland*, 288 F. 2d 126 (D. C. Cir.), cert. denied, 364 U. S. 900 (1960). It challenged Dr. Pauling's assertions that the Subcommittee was investigating his views on nuclear testing, asserted the investigation was needed to determine whether the right of petition was in fact being utilized by or in the interest of the world Communist movement, and recommended the study of legislation to make that "more difficult." Whatever views may be held with respect to such investigations, see *United States* v. *Welden*, —— U. S. ——, —— (1964) (dissenting opinion of Mr. Justice Douglas), the report was regular and carried the usual privilege even though it was unusual in being aimed at the activities of one person.

[86c] your career had been connected with various pro-Communist or Communist front political activities and with a significant number of persons whose affiliations with the Communist Party U. S. A. are a matter of record?''

Upon objection that this was ''hearsay'' and ''conclusion,'' the court permitted the witness to ''answer whether they said that and whether he says this is one of the false statements. If he says it is a false statement, it is a false statement.'' Dr. Pauling admitted that the Subcommittee Report had made statements substantially as characterized by defense counsel but denied their truth.[9] Maury testified that he had read the Subcommittee report when it was released in March, 1961, and that he ''may have looked at it'' again before writing the editorial but in any event ''I was familiar with it. I knew the whole substance of the thing.''

Our previous discussion has shown that the Subcommittee Report itself would have been admissible for a number of purposes. We do not understand why defense counsel chose to get it before the jury in the way he did rather than by offering it or reading from it, but that is not our concern if plaintiff was not prejudiced thereby. Since the terms of the Report were at issue, the best evidence rule entitled

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[9] On another occasion, when Dr. Pauling was asked whether the Subcommittee found that he ''had consistently opposed legislation and agencies set up by the American Government to safeguard itself against Communist subversion,'' his trial counsel, after repeating his previous objection, noted, apparently to fortify this, that defense counsel was reading from the Subcommittee Report. Later Dr. Pauling was asked whether the Committee had found ''that you over the past decade played a role of outstanding importance as an organizer and spokesman in the United States for organizations recognized as part of the Communist peace offensive and that in recent years you had concentrated your efforts in the test ban field?'' The Court overruled an objection that this was hearsay, stating ''The only question is whether Dr. Pauling recognizes the Committee said that about him, not whether it is true or not.''

[87c] plaintiff to object to oral testimony as to its contents and to insist that the report itself be offered; but plaintiff's trial counsel refrained from pressing that point, wisely, we think, since the report itself would have been immensely more damaging than the few questions asked about it. We have examined the Report to see whether the questions propounded were an unfair paraphrase; we find them to have been almost a literal transcription from two of the Subcommittee's eleven unfavorable conclusions.[10] To be sure, it was scarcely relevant whether Dr. Pauling knew what the Subcommittee had said, but if defendant chose to prove the Subcommittee's statements by the oral testimony of a reader of the report, we find no ground for reversing on that account when no objection under the best evidence rule was made—particularly when it is so plain that proceeding in this manner caused no prejudice.

We thus come to the serious issue in the case—whether it was reversible error for the judge not to have given specific instructions as to the limited purpose for which the jury might utilize the evidence just reviewed. We note preliminarily that the burden of seeing to it that a proper limitation is placed on the use of utterances banned by the hear-

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[10] Others of these were:

"(1) The vague and general wording of Dr. Pauling's petition [in 1958 to the United Nations], in particular the omission of any reference to the need for adequate inspection (at a time when the Kremlin was opposed to even token inspection) made it acceptable to the Soviet Government and therefore to Soviet scientists. It bore a marked similarity to the wording of the test-ban petitions put out by the Communists through their creature organization, the World Peace Congress."

"(4) Communist interest in and exploitation of Dr. Pauling's petition constituted a phase of the Kremlin's fraudulent 'peace' offensive."

"(6) . . . He has participated in many international organizations and international conferences sponsored by the Communist peace offensive . . . In his statements and attitude Dr. Pauling has displayed a consistent pro-Soviet bias."

[88c] say rule as proof of the facts stated but admissible for narrower purposes, falls on the opponent of the evidence. See 1 Wigmore, *supra*, § 13; *Malatkofski* v. *United States*, 179 F. 2d 905, 914 (1 Cir. 1950); *United States* v. *Smith*, 283 F. 2d 760, 764 (2 Cir. 1960), cert. denied, 365 U. S. 851 (1961); *United States* v. *Mont*, 306 F. 2d 412, 415-16 (2 Cir.), cert. denied, 371 U. S. 935 (1962); *Case* v. *New York Central R.R.*, 329 F. 2d 936 (2 Cir. 1964); *Lieberman* v. *Gulf Oil Corp.*, 331 F. 2d 160, 164-65 (2 Cir. 1964).

Both parties had submitted written requests for instructions. When the taking of testimony ended, the judge expressly, and properly, denied a request by the plaintiff for a binding instruction that the editorial was defamatory. He denied the other requests of both sides "in the form stated because in certain respects they are argumentative; in other respects they are not complete," but said he would use them in preparing his charge. In dealing with the defense of fair comment he called the jury's attention to Maury's testimony "that he relied on the hearings before, and the report of, a Senate Sub-committee on Internal Affairs, and on various newspaper clippings in his possession when the editorial was written." He said also that the defendant might resist or minimize a claim for punitive damages by showing "that in writing the editorial he did so in good faith, relying on certain matters which had come to his attention . . ." He did not say that the defense of truth could not be sustained by evidence that would be hearsay for that purpose although he in no way intimated that it could.

At the conclusion of his charge, the judge asked whether there were any exceptions. One of plaintiff's trial counsel sought various amplifications, several of which the court made. Counsel then said "We have no exceptions because the Court has remarked on what he thought," repeated "We have no exception," and asked whether the

[89c] exhibits would go to the jury, which the judge confirmed. Defendant says that under F. R. Civ. Proc. 51 this ends the matter. Plaintiff's contrary contentions rests on (a) his requests to charge and (b) an alleged denial of opportunity to take exceptions.

(a) One of plaintiff's requested instructions, No. 6, was that the court had permitted the introduction of hearsay testimony, "in other words, testimony which consists of rumors or information conveyed to the officers of the defendant corporation" and that such testimony "was not admitted as evidence of truth of the defendant's libelous publication, but was admitted for the sole and only purpose of establishing on the part of the defendant good or bad faith, malice or the lack of it." Another, No. 19, relating to the defense of truth, included a statement "that the defendant cannot establish the truth by hearsay testimony, nor can it establish the truth by rumor, nor by the testimony of its agents and publishers that they believed the truth of the libelous publication when it was published."

Requested instruction No. 6 suffered from the vice of overstatement usual in such requests. The word "rumors" was grossly inappropriate; moreover, and more important, the instruction made no allowance for the admissibility of this "hearsay" to prove that defendant's comments were based on statements of fact within a privilege, see fn. 6, and would scarcely have conveyed the permissible use of the evidence to prove a partial defense in mitigation of damages under § 78 of the New York Civil Rights Law. On the other hand, the request quoted from Instruction No. 19 was substantially correct.

We see no reason to doubt that if the point had been called to Judge Dawson's attention by a timely objection, he would have supplemented his charge accordingly. The case is not like the decisions in the circuit, relied on by appellant, where the Judge, having focussed on the point,

[90c] charged the opposite of what had been requested, so that objection would have been a useless formality. *Sweeney* v. *United Feature Syndicate, Inc.*, 129 F. 2d 904 (2 Cir. 1942); *Wright* v. *Farm Journal, Inc.*, 158 F. 2d 976, 978 (2 Cir. 1947) [supplemental request after charge]; *Keen* v. *Overseas Tankship Corp.*, 194 F. 2d 515, 518-19 (2 Cir.), cert. denied, 343 U. S. 966 (1952). Here the judge had referred to the challenged evidence only in connection with issues as to which it was properly receivable; the defect was solely of omission. Judge Dawson had been entirely receptive to plaintiff's other requests for supplementary instructions; on counsel's objection, he further charged the jury that in figuring damages they should take account of the News' wide circulation, that malice could be established by circumstantial evidence, that an unsuccessful plea of truth could tend to support a finding of malice, that the law presumes a person's reputation to be good, and that in deciding whether an article is libelous they must consider it as a whole and in its effect on a person of ordinary understanding. When we add to the reiterated "We have no exceptions" counsel's commendation of the charge as "lengthy and thorough" and "a very good job," and the judge's request for specific exceptions, expressly stating "I am not going to review all your requests to charge," we conclude that the judge's attention was not adequately called to the omission now urged. Indeed, the case is less favorable to plaintiff than *Rosenfeld* v. *Curtis Publishing Co.*, 163 F. 2d 660 (2 Cir. 1947), where Judge Clark, surely no stickler for formalism, considered that not enough had been done to warrant reversal for a new trial.

We are the more inclined to this view in that the "hearsay" evidence to which objection had been made, some eight or nine questions in a four-day trial with nearly 500 pages of testimony, had not played a role anything like so impressive as that which appellate counsel, with entire pro-

[91c] priety, has assigned on appeal or as would be indicated by the attention to it in this opinion. Defense counsel did not even refer to these questions and answers in his summation, which was devoted rather to the allegedly non-defamatory character of the article as applied to activities which Dr. Pauling had admitted. Plaintiff's counsel might well have thought it better trial tactics to let a sleeping dog lie rather than to press a request that the jury be told the purposes for which the report of the Senate Subcommittee could not be considered and thereby precipitate a request by the News that the judge impress upon the jury the important purposes for which it could be.

(b) The contention that the judge prevented the taking of full exceptions to his charge rests on an affidavit in support of a motion for a new trial by one of the two lawyers who were plaintiff's trial counsel—not the one who had spoken at the conclusion of the charge. The claim was that since both lawyers came from another state, they were unfamiliar with local practice as to when and how exceptions to the charge should be taken; that, upon inquiry in chambers, Judge Dawson told them that "minor exceptions" could be taken in the presence of the jury but that "general exceptions for the record" should then be taken out of the presence of the jury; that the objections made at the conclusion of the charge were only those "we could reasonably expect that the Court would alter or add to the charge";[11] an that as soon as the jury filed out, the affiant requested an opportunity to take further exceptions, which the judge refused on the basis of the previous statement of his associate. In denying the motion Judge Dawson filed a memorandum which characterized this claim

[11] As indicated, we see no reason why the requests here under discussion did not come within this description. The only request the judge had expressly refused was to instruct that the article was defamatory.

[92c] as "completely false." The memorandum stated that the request for permission to take further exceptions to the charge was not made until after the jury was in the jury room and the court reporter had left, and while defense counsel was leaving; and that the court then pointed out that exceptions must be taken before the jury begins its deliberations so that if the exceptions were proper the court could correct its charge.

F. R. Civ. Proc. 51 states, with complete clarity and good sense, that objections to instructions must be made "before the jury retires to consider its verdict." See *O'Connell* v. *Naess,* 176 F. 2d 138, 140 (2 Cir. 1949). Although there may be differences in practice among districts, or among judges in the same district, whether objections should be made within or without the hearing of the jury, any procedure for deferring the making of objections until after the jury has begun its deliberations would be so wholly contrary to the language and spirit of the Rule that we cannot believe it is followed in any district and surely cannot imagine that Judge Dawson in any way countenanced this. Insofar as the argument has any merit, it must rather be on the basis that the judge should have postponed the beginning of the jury's deliberations until a second series of objections could be made. But the judge was justified in thinking there was no intention to make any. As we have stated, after making various objections quite as important as those now claimed to have been reserved, associate trial counsel twice recited there were no more, and indicated, by his remarks as to the exhibits, that he expected the jury to begin its deliberations without delay. Then came the excusing of the alternate jurors, the swearing of the marshals, and a statement by the court "The jury may retire under the escort of the marshals to the jury room. I will be in court awaiting your verdict"—all without the slightest effort to make the further "general" ex- [93c] ceptions which the judge had said

should be made outside the presence of the jury but certainly not after the jury began to deliberate. Although it would not have been error for him to tell the jury to postpone its deliberations, and recall the court reporter and defense counsel, he was not required to do so.[12]

(3) We have given careful consideration to the claim of unfairness on the part of the trial judge. It is difficult for an appellate court to appraise the significance of remarks that may look quite different in a cold record than when made in the give and take of a trial. Although some comments would better have been foregone, the record is far from manifesting such unfairness as to warrant our ordering a new trial after a balanced charge and an afternoon's deliberation by the jury.

If we took a different view on the matters here reviewed, it might be necessary to consider whether the judgment would not have to be affirmed in any event in the light of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964). We realize that the sole point actually determined by that decision was that the First Amendment requires a state to recognize a "privilege for criticism of official conduct," 376 U. S. at 282, extending to misstatements of fact, this being regarded as in some way the reciprocal of the privilege of federal officials against liability for defamatory statements "within the outer perimeter" of their duties. See *Barr* v.

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[12] What we have written in regard to the failure to give express instructions that the "hearsay" evidence that had been admitted could not be used to support the defense of truth, applies *a fortiori* to the contention that we ought reverse for failure of the judge to give an express instruction that the News had the burden of proving the defense of fair comment. The judge twice spoke of the defendant's having to "establish" this defense. Moreover, there is New York authority that where, as here, the "public occasion" is evident, the plaintiff has the burden of showing that the defendant went beyond proper bounds. *Kenna* v. *Daily Mirror, Inc.*, 250 App. Div. 625, 295 N.Y.S. 219 (1st Dept.), aff'd, 276 N. Y. 483 (1937).

[94c] *Mateo*, 360 U. S. 564, 575 (1959). Although the public official is the strongest case for the constitutional compulsion of such a privilege, it is questionable whether in principle the decision can be so limited. A candidate for public office would seem an inevitable candidate for extension; if a newspaper cannot constitutionally be held for defamation when it states without malice, but cannot prove, that an incumbent seeking re-election has accepted a bribe, it seems hard to justify holding it liable for further stating that the bribe was offered by his opponent. Once that extension was made, the participant in public debate on an issue of grave public concern would be next in line; thus, as applied to the case in hand, if a newspaper could not be held for printing Dr. Pauling's charges that a member of the Atomic Energy Commission had "made dishonest, untrue and misleading statements to mislead the American people" and that a United States Senator is "the greatest enemy . . . the United States has," as the *New York Times* case decided, one may wonder whether there would be sound basis for forcing it to risk a jury's determination that it was only engaging in fair criticism rather than misstating facts if it printed, falsely but without malice, that in saving all this Dr. Pauling was following the Communist line. The "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," now applied to confer immunity on "vehement, caustic, and sometimes unpleasantly sharp attacks on governmental and public officials," 376 U. S. at 270, may some day be found to demand still further erosion of the protection heretofore given by the law of defamation. It suffices for our decision here that Dr. Pauling's case was properly submitted to the jury under pre-*New York Times* law.

Affirmed.